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In the Supreme Court of the United States

OCTOBER TERM 1947

No. 55

LAWRENCE B. GOLDSMITH,
Petitioner,

vs.

THE UNITED STATES OF AMERICA.

BRIEF OF PETITIONER GOLDSMITH

This case is before this Court on writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit (R507). Goldsmith's petition, supporting brief and appendices were filed in the October Term 1946 and numbered for that term No. 1163. As his brief on the merits, petitioner adopts his petition, the supporting brief and appendices, with the following corrections and comments directed to the Government's position as stated in its brief in opposition to the petition:

The majority opinion below is reported in 158 F2d 883 and the dissenting opinion of Judge Denman is reported in 158 F2d 762.

The proper citations for three cases cited in the petition and brief are:

Kotteakos v. United States, 328 U.S. 750, 90 L.ed. 1557;

American Tobacco Co. v. United States, 328 U.S. 781, 90 L.ed. 1575;

Fiswick v. United States, 329 U.S. 211, 91 L.ed. (Adv. Op.) 183.

United States v. Bayer, 331 U.S. ....., 91 L.ed. (Adv. Op.) 1294, 1300 (citing *Pinkerton v. United States*, 328 U.S. 640, 90 L.ed. 1489) should be added to the cases cited in Note 5 on page 18.

The Government's brief states that Goldsmith and Weiss were partners operating Francisco Distributing Co. (p. 3). They were not. Weiss had been a partner, but had withdrawn from the partnership (see Basic Permit, R244 and R384).

We made the point in the petition (p. 15) and brief (p. 32) that the testimony of agent Harkins was not admissible over the objection that it was without foundation and that there was no independent proof or corroboration of the corpus delicti. The Government's brief says that the necessary corroboration is found in "the evidence summarized in the Statement, *supra*" (p. 11). The vice of the suggestion is that in the "Statement" (pp. 3-6) no distinction is made between the Harkins hearsay and other evidence. The Statement assumes the proper admission of the Harkins testimony and makes full use of it. The result is that the claimed extra-judicial admissions

are made to serve as the foundation for their own introduction in evidence. With deference, the Government's brief and Baron Munchausen are at one in claiming ability to lift themselves by their own bootstraps.

The Government's brief has undertaken to state the cases against this petitioner, as follows:

> "The required showing for petitioners Goldsmith and Weiss is found in their conclusion of the arrangements for receipt and storage of the whiskey, in their preparation of invoices below ceiling price in a time of overwhelming demand for liquor and in their receipt of a flat $1.00 a case apiece for their participation. And, as stated above, their participation as 'legitimate' wholesalers was indispensable to the success of the conspiracy."

The statement as to a "flat $1.00 a case" rests on nothing more substantial than the Harkins hearsay. But even with this included, the want of substance of the case, thus claimed to have been made, as providing a basis for an "inference" that petitioner Goldsmith was a party to a conspiracy to sell whiskey over the ceiling price readily can be shown.

Upon the one hand, how does the case, claimed to have been made, as to 1575 cases paid for at a price over the ceiling differ, so far as Goldsmith is concerned, from the 2465 cases sold under the ceiling and without any side payment? Goldsmith's activity and/or want of activity as to the 1575 on the one side and the 2465 on the other was exactly the same even down to the Harkins hearsay "of a flat $1.00 a case apiece," if that evidence can be considered. Goldsmith's knowledge or want of knowledge

was exactly the same. As to both classes, the "conclusion of the arrangements for receipt and storage of the whiskey" was the same. As to both classes his sales price was the same and the "preparation of invoices" was the same. In the case of each class, the participation of Francisco as a wholesaler was indispensable and the same. In the case of both classes, the whiskey was paid for in the same way and was ordered from the warehouse in the same way.

On the other hand, how did the "participation" of Goldsmith differ in any way from the participation of Sander, division manager of the Liquor Department of the San Francisco Warehouse Company (R251-265)? The participation of a warehouse was indispensable. Sander was the manager of the warehouse. He is not shown to have had any less personal participation in the transactions or knowledge of over-ceiling payments than Goldsmith. The warehouse certainly received payment for its services in handling the whiskey, actually received, stored and shipped the whiskey and prepared the necessary papers.

The cases cited at pp. 8 and 9 of the Government's brief are so different on their facts as to require no extended comment. The *Baker* and *Oliver Cases* involved fraudulent schemes for the distribution of land and the heart of the schemes was a misrepresentation of the thing being sold. The owner or seller could not have been ignorant of what was going on and was not ignorant. In the *Great Atlantic and Pacific Tea Co. Case*, the question arose on the indictment. The facts are wholly different.

The *Silkworth Case* was a bucket-shop case, and brokers who received "commissions" when they had not acted, must have known that the operation was a bucket-shop operation,—the inference was irresistible.

There is an attempt to distinguish *United States v. Falcone*, 311 U.S. 205, 85 L.ed. 128 upon the ground that in this case title to the whiskey did not pass through Feigenbaum, Abel and Blumenthal, the sellers of the whiskey, but they arranged the sales in such way that title passed directly from Francisco to the tavern owner. The technical passage of the legal title, whatever importance it might have in some piece of civil litigation involving the law of sales, is colorless here. The important thing is that a merchant, legitimately selling merchandise, is not a party to a conspiracy because the person with whom he deals has, unknown to him, arranged for an illegal use or disposition of merchandise which is sold in the ordinary course of business.

Finally, there has been no attempt by the Government to deal with the proposition that the defendant distributor is an individual, Lawrence B. Goldsmith, not an organization, or an association doing business under the name of Francisco Distributing Co. and that whatever the activity of persons engaged in a business enterprise under the name of Francisco Distributing Co. may have been, no knowledge of improper activity has been brought home to the individual, Goldsmith. No more has been shown than that he was the proprietor of the business. Even the character or size of the business organization does not appear. Beyond directing that the whiskey be paid for and making out some of the invoices at a price below the

ceiling (both for the 1575 paid for over the ceiling and the 2465 paid for at $24.50, below the ceiling) no activity or knowledge on his part has been shown. The Government has made no attempt to deal with "the long established law that guilt is personal and that men can only be held responsible for the unlawful acts of associates because of participation in, authorization or ratification of such acts" which lies at the basis of Section 6 of the Norris-LaGuardia Act. See *United Brotherhoods v. United States*, ... U.S. ....., 91 L.ed. (Adv. Op.) 705, 711. "Guilt with us remains individual and personal, even as respects conspiracy" (*Kotteakos v. United States*, supra).

It is respectfully submitted that the judgment must be reversed as to petitioner Goldsmith.

Dated at San Francisco, September 24, 1947.

ARTHUR B. DUNNE,
WALTER H. DUANE,
Attorneys for petitioner Goldsmith.